90-1432

Supreme Court, U.S.
FILED
MAR 7 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

HAROLD W. CLARKE, THE WARDEN OF THE NEBRASKA STATE PENITENTIARY,

Petitioner,

v.

WELDON ROSS,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

DON STENBERG
Nebraska Attorney General
*J. KIRK BROWN
Assistant Attorney General
Chief, Criminal Appellate Section
Nebraska Department of Justice
2115 State Capitol
Lincoln, NE 68509-8920
(402) 471-2682

TERRI M. WEEKS
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-8920
(402) 471-2682
Counsel for Petitioner

March 7, 1991

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

40

QUESTION PRESENTED

1. Whether or not there is a Fourteenth Amendment constitutional right to credit for presentence incarceration, when the prisoner is held for a bailable offense, the prisoner is unable to make bail because of indigence, and upon conviction the prisoner is sentenced to less than the statutory maximum and/or said sentence in addition to the presentence incarceration time does not exceed the statutory maximum sentence for such offense.

LIST OF PARTIES

The parties to the proceedings below were the petition Harold W. Clarke, the Warden of the Nebraska State Penitentiary and the respondent Weldon Ross.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT'S JUDGMENT GRANTING THE RESPONDENT CREDIT FOR TIME SPENT IN JAIL BEFORE SENTENCE FOR FAILURE TO MAKE BAIL DUE TO INDIGENCE WHEN THE CONVICT'S SENTENCE DID NOT EXCEED THE STATUTORY MAXIMUM AND/OR THE SENTENCE IMPOSED IN ADDITION TO THE PRESENTENCE INCARCERATION TIME DID NOT EXCEED THE STATUTORY MAXIMUM SENTENCE FOR SAID OFFENSE, CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS 6

II. THE CHANGE IN CIRCUMSTANCE SINCE THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT MAY HAVE RENDERED THIS APPEAL MOOT, HOWEVER IF THE IMMEDIATE ISSUE IS MOOT, THE PUBLIC INTEREST EXCEPTION ALLOWS THIS COURT TO RENDER A DECISION ON THE MERITS 13

CONCLUSION 19

TABLE OF CONTENTS – Continued

Page

APPENDIX ..... infra

1. Judgment of the United States Court of Appeals for the Eighth Circuit, dated December 7, 1990 ..... 1a

2. Order of the United States Court of Appeals for the Eighth Circuit denying the Appellee's petition for rehearing *en banc*, dated February 26, 1991 ..... 2a

3. Order of the United States District Court for the District of Nebraska denying the petition for writ of habeas corpus, dated April 10, 1990 ..... 3a

4. Report and Recommendation of the United States Magistrate recommending that the petition for writ of habeas corpus be denied, dated February 26, 1990 ..... 4a

5. Notice of Appeal of intent to prosecute an appeal to the Eighth Circuit, dated April 17, 1990 ..... 8a

6. Order of the United States District Court for the District of Nebraska ordering that a certificate of probable cause shall issue, dated April 26, 1990... 9a

7. Excerpt portions of testimony from the bill of exceptions at Weldon Ross' sentencing hearing in State court 10a

TABLE OF AUTHORITIES

Page

CASES:

FCC v. Pacifica Foundation, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) 18

Hook v. Arizona, 496 F.2d 1172 (9th Cir. 1974) 8

King v. Wyrick, 516 F.2d 321 (8th Cir. 1975) 5, 9, 10

Lewis v. Continental Bank Corporation, 494 U.S. ___, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990) 14

Matthews v. Dees, 579 F.2d 929 (5th Cir. 1978) 8

Palmer v. Dugger, 833 F.2d 253 (11th Cir. 1987) 7

Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968) 14

Southern Pac. Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911) 16

State v. Patterson, 237 Neb. 198, ___ N.W.2d ___ (1991) 16

State v. Ross, 220 Neb. 843, 374 N.W.2d 228 (1985) 4, 10, 12

Tate v. Short, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971) 6, 7, 13

Vasquez v. Cooper, 862 F.2d 250 (10th Cir. 1988) 8

Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970) 6, 7, 10, 13

STATUTES:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2254 ..... 2, 3

TABLE OF AUTHORITIES – Continued

Page

Neb.Rev.Stat. § 28-932 (Cum. Supp. 1984) 12, 16, 18

Neb.Rev.Stat. § 29-2221 (Reissue 1979). 3

OTHER:

U.S. Const. Amend. XIV, § 1 3

No. _____

In The

Supreme Court of the United States

October Term, 1990

HAROLD W. CLARKE, THE WARDEN OF THE NEBRASKA STATE PENITENTIARY,

Petitioner,

v.

WELDON ROSS,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

The petitioner Harold W. Clarke respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on December 7, 1990.

OPINIONS BELOW

The judgment of the Court of Appeals for the Eighth Circuit is reprinted in the appendix hereto, p. 1a, infra.

The report and recommendation and the Order of denial of Writ of Habeas Corpus of the United States District Court for the District of Nebraska (Urbom, D.J.) has not been reported. It is reprinted in the appendix hereto, pp. 3a-7a, infra.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 2254, the respondent brought this suit in the District Court of Nebraska. On April 10, 1990, the District Court denied the respondent's petition for a writ of habeas corpus. See p. 3a, infra.

On respondents' appeal, the Eighth Circuit on December 7, 1990, entered a judgment reversing the District Court's order and directing that respondent's action be remanded to the United States District Court for the District of Nebraska with directions to grant the respondent credit for time spent in jail before sentence for failure to make bail due to indigence. See p. 1a, infra. The petitioner sought rehearing and rehearing *en banc* wherein both requests were denied by the United States Court of Appeals for the Eighth Circuit on February 26, 1991. See p. 2a, infra.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

STATEMENT OF THE CASE

Weldon Ross, an inmate at the Nebraska State Penitentiary, appealed the denial of his petition for a writ of habeas corpus to the United States Court of Appeals for the Eighth Circuit. The habeas corpus relief was sought pursuant to 28 U.S.C. § 2254. The dismissal of the Appellant's habeas corpus action was his first brought in the United States District Court for the District of Nebraska.

Ross was tried and convicted by a jury for assault by a confined person in the District Court of Lancaster County, Nebraska, on September 17, 1984. After a hearing, the District Court found that Ross was an habitual criminal and the court sentenced him under *Neb.Rev.Stat.* § 29-2221 (Reissue 1979), to a minimum term of 10 years imprisonment. Ross appealed his conviction and sentence to the Nebraska Supreme Court contending that there

should have been a mistrial due to prosecutorial misconduct, and that he should have received credit for presentence jail time. The Nebraska Supreme Court affirmed his conviction and sentence, holding that the alleged examples of prosecutorial misconduct did not entitle Ross to a mistrial, and that it was within the discretion of the trial court to deny credit for jail time prior to sentencing. *State v. Ross*, 220 Neb. 843, 374 N.W.2d 228 (1985). Subsequently, Ross sought post-conviction relief in the District Court of Lancaster County, Nebraska, but relief was denied.

Ross then filed his petition for writ of habeas corpus in the United States District Court for the District of Nebraska, contending that he should have been given credit for time served prior to his sentencing. Ross spent approximately one year as a pretrial and presentence detainee from the date of the offense of assault by a confined person, March 27, 1984, until sentencing, November 2, 1984 (220 days). When Ross committed the underlying criminal offense of assault by a confined person (which was subsequently enhanced to an habitual criminal charge) he was already imprisoned on other criminal charges (pp. 10a-11a, infra).

United States Magistrate Piester found no merit in Ross' petition and recommended that the petition for a writ of habeas corpus be denied (pp. 4a-7a, infra). Ross filed an objection to the Magistrate's Report and Recommendation. United States District Court Judge Urbom adopted the Magistrate's Report and Recommendation and ordered that the petition for a writ of habeas corpus be denied (p. 3a, infra). Ross appealed the denial of the

writ of habeas corpus to the United States Court of Appeals for the Eighth Circuit (pp. 8a-9a, infra).

On December 7, 1990, without presentation of oral argument, the Eighth Circuit entered a judgment ordering that the matter be remanded to the United States District Court for the District of Nebraska with directions to grant Ross credit for time spent in jail before sentence for failure to make bail due to indigence (p. 1a, infra). The Eighth Circuit cited *King v. Wyrick*, 516 F.2d 321, 324 (8th Cir. 1975) as legal precedent in support of their judgment. On December 13, 1990, Ross was discharged from the legal authority of the Nebraska Department of Correctional Services for time served irrespective of the Eighth Circuit judgment dated December 7, 1990 (p. 1a, infra).

On December 20, 1990, Harold Clarke, the Warden of the Nebraska State Penitentiary, petitioned the Eighth Circuit for rehearing and suggestion for rehearing *en banc*. The petition for rehearing and suggestion for rehearing *en banc* were both denied on February 26, 1991 (p. 2a, infra).

REASONS FOR GRANTING THE WRIT

I.

THE EIGHTH CIRCUIT'S JUDGMENT GRANTING THE RESPONDENT CREDIT FOR TIME SPENT IN JAIL BEFORE SENTENCE FOR FAILURE TO MAKE BAIL DUE TO INDIGENCE WHEN THE CONVICT'S SENTENCE DID NOT EXCEED THE STATUTORY MAXIMUM AND/OR THE SENTENCE IMPOSED IN ADDITION TO THE PRESENTENCE INCARCERATION TIME DID NOT EXCEED THE STATUTORY MAXIMUM SENTENCE FOR SAID OFFENSE, CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

Through broad interpretation, the Eighth Circuit has provided the respondent, Weldon Ross, undue protection pursuant to the Fourteenth Amendment of the United States Constitution. The Eighth Circuit has afforded Ross with the constitutional right to equal protection whereby the court granted credit for time spent in jail before sentence for failure to make bail due to indigence when Ross' sentence did not exceed the statutory maximum and/or the sentence imposed in addition to the presentence incarceration time did not exceed the statutory maximum sentence for said offense. Such a broad interpretation deserves this Court's attention.

The Eighth Circuit's broad expansion of a doctrine of equal protection as it pertains to presentence jail time credit directly conflicts with this Court's ruling in *Williams v. Illinois*, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970) and *Tate v. Short*, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971). In *Williams v. Illinois, supra*, the State sought to confine the defendant for longer than the statutory maximum to make him "work off" the fine the

sentencing judge had imposed along with the maximum sentence. The Court struck down Illinois' practice of incarcerating beyond the maximum term those defendants unable to pay a fine. The Court in *Williams* concluded "that when the aggregate imprisonment exceeds the maximum period fixed by the statute and results directly from an involuntary nonpayment of a fine or court costs we are confronted with an impermissible discrimination that rests on ability to pay . . . " *Id.* 399 U.S. at 240-41, 90 S.Ct. at 2022, 26 L.Ed.2d at 592. The Court held that "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." *Id.* 399 U.S. at 244, 90 S.Ct. at 2023-24, 26 L.Ed.2d at 594.

The following year after the *Williams* decision, the Court in *Tate v. Short,* 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971), extended *Williams* to bar imprisonment of an indigent defendant who was unable to pay the fine for an offense that was punishable only by fine. The holdings of *Williams* and *Tate* stand for the proposition that no person may be incarcerated, upon conviction of a crime, for a period longer than the maximum sentence set by statute solely on the basis of his or her inability to pay a criminal fine. They do not stand for the sweeping proposition that whenever a person spends more time incarcerated than a wealthier person would have spent, the equal protection clause is violated.

Equally in conflict with the judgment below is *Palmer v. Dugger,* 833 F.2d 253 (11th Cir. 1987). In *Palmer,* the Eleventh Circuit held that "a prisoner is entitled to credit for presentencing incarceration if three conditions are

present: (1) the prisoner is held for a bailable offense; (2) the prisoner is unable to make bail because of indigence; and (3) upon conviction the prisoner is sentenced to the statutory maximum sentence for that offense." *Id.* 833 F.2d at 255. Also in conflict with the Eighth Circuit's judgment is *Matthews v. Dees*, 579 F.2d 929 (5th Cir. 1978). In *Matthews*, the Fifth Circuit held that there is no constitutional right to credit for presentence confinement when the total confinement is less than the maximum allowed. *Id.* 579 F.2d at 931.

The Ninth Circuit is also in conflict with the judgment below. In *Hook v. Arizona*, 496 F.2d 1172 (9th Cir. 1974) the court held that a defendant retains the right not to have the statutory maximum sentence extended by reason of indigency. Hook was entitled to credit for presentence confinement suffered due to indigency when he was liable to serve the statutory maximum sentence or beyond. In *Vasquez v. Cooper*, 862 F.2d 250 (10th Cir. 1988), the Tenth Circuit Court held that the defendant was not entitled to credit against sentence for time spent in pretrial custody. He was not entitled either as a matter of equal protection or due process where the defendant's pretrial incarceration was one of the factors considered by the judge in ordering sentence, and the defendant's total incarceration time was within the statutory limitation set for that offense. The total time Vasquez spent in confinement did not exceed the maximum term defined by statute.

The judgment of the Eighth Circuit ordered that the matter be remanded to the United States District Court for the District of Nebraska with directions to grant Ross credit for time spent in jail before sentence for failure to

make bail due to indigence (p. 1a, infra). The Eighth Circuit held that there is a constitutional right to credit for presentence incarceration even where the total time is less than the maximum penalty for the offense. *King v. Wyrick*, 516 F.2d at 321-25. The *King* Court reasoned as follows:

> Since *Williams v. Illinois*, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970), and *Tate v. Short*, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971), many federal courts have come to recognize that failure to grant credit on an indigent prisoner's sentence for time spent in jail before sentencing for failure to meet bail due to indigency has constitutional implications. Several courts have held that it is a denial of equal protection not to grant an indigent prisoner credit for jail time served after he has been unable to meet bail due to indigency when his sentence plus the previous jail time adds up to a total period of incarceration longer than the maximum allowable term prescribed by law for the offense committed. *See, e.g., Parker v. Estelle*, 498 F.2d 625 (5th Cir. 1974); *Hook v. State of Arizona*, 496 F.2d 1172 (9th Cir. 1974); *Hill v. Wainwright*, 465 F.2d 414 (5th Cir. 1972); *Hart v. Henderson*, 449 F.2d 183 (5th Cir. 1971). *See also Reanier v. Smith*, 83 Wash.2d 342, 517 P.2d 949 (1974) (credit on statutory maximum and minimum sentence); *In re Young*, 32 Cal.App.3d 68, 107 Cal.Rptr. 915 (1973) (credit on statutory minimum sentence). This result follows from the holding in *Williams v. Illinois, supra*, 399 U.S. at 244, 90 S.Ct. at 2023, that "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." It was pursuant to the equal protection rationale that the Magistrate recommended that

> petitioner be granted credit on the maximum 10-year sentence of burglary.

Id. 516 F.2d at 323.

The holding in *King* and the Eighth Circuit's reliance thereon far exceeds the Supreme Court of the United States' holding in *Williams v. Illinois, supra,* wherein they held that there is a federal constitutional right not to be subjected to imprisonment beyond the statutory maximum solely because of indigence. The Eighth Circuit's ruling in *King* and its reliance in support of its judgment which is at issue in the present petition is at odds with other Courts of Appeals, e.g. 5th, 9th, 10th and 11th circuits.

In the present case, Ross was sentenced to the statutory minimum, i.e. ten years for being found guilty of being an habitual criminal. *See, State v. Ross,* 220 Neb. 843, 843-44, 374 N.W.2d 228, 229 (1985). Ross asked for credit from the date of the offense, March 27, 1984, until sentencing, November 2, 1984 (220 days). The fact of the matter is that "[o]n March 27, 1984, while confined to the Lancaster County jail and awaiting trial on other charges, the defendant struck Officer Michael Craft." *Id.* 220 Neb. at 844, 374 N.W.2d at 229. The testimony from the sentencing hearing also demonstrates that indigence was not the reason, the appellant was denied credit:

> THE COURT: . . .
>
> The Court is going to impose the minimum sentence provided by law; ten years confinement in an institution under the control of the Nebraska Department of Public Institutions, of Correctional Services, plus the costs of this action.

The Court is midful [sic] of the statute of no credit for offenses of this nature and the Court will not give any credit.

Fine, thank you.

The Court would remand you to the custody of the Department of Correctional Services.

MR. GOOCH: Your Honor, with respect to that, I think the statute only says that you cannot give credit prior to the event, not subsequently. But I'd ask the Court maybe just to look at the statute because, certainly, from March 28th on, Weldon has been in custody on this charge and has not been able to make the bond on this charge. And that statute is real clear that the time before that the Court is not supposed to give credit, but I don't think the statute even suggests that the Court ought to give credit after that. And perhaps if we could just take a moment and look at the statute.

THE COURT: I have. I have read it many, many times since this question was brought up some time ago. He's still being held on those other charges and I guess this alleged offense happened while he was being held on those other charges. So then I don't think even the recent case law that has come down from our Supreme Court where they have given credit after a plea or after a conviction and they gave credit then – I think it was a Grand Island, a Hall County case – I don't even think that's appropriate in this case because, again, he was still being held under those cases, those other cases, and they were still pending in court. So I don't think any credit is available.

Fine, thank you.

(pp. 10a-12a, infra).

Moreover, the underlying criminal statute, assault by a confined person, *Neb.Rev.Stat.* § 28-932 (Cum. Supp. 1984) provides:

> (1) Any person who is legally confined in a jail or correctional or penal institution and intentionally, knowingly, or recklessly causes bodily injury to another person shall be guilty of a Class IV felony, except that if a deadly or dangerous weapon is used to commit such assault he or she shall be guilty of a Class III felony.
>
> (2) Sentences imposed under subsection (1) of this section shall be consecutive to any sentence or sentences imposed for violations committed prior to the violation of subsection (1) of this section and shall not include any credit for time spent in custody prior to sentencing unless the time in custody is solely related to the offense for which the sentence is being imposed under this section.

Ross' time in custody was not solely related to the offense for which the sentence was being imposed under *Neb.Rev.Stat.* § 28-932 (Cum. Supp. 1984), but rather Ross was being held on other charges (pp. 11a-12a, infra). It was not until after he was found guilty of being an habitual criminal (p. 10a, infra) that the other charges for which he was being held, were dismissed (pp. 11a-12a, infra). Therefore, it is clear, that according to *Neb.Rev.Stat.* § 28-932, Ross was not entitled to credit for time served. *See also, State v. Ross*, 220 Neb. at 846-47, 374 N.W.2d at 230-31.

It is Clarke's position that the judgment rendered on December 7, 1990, is contrary to law. The judgment did not grant Ross a writ of habeas corpus but it did remand for the imposition of presentence jail credit. Ross was

never subjected to imprisonment beyond the statutory maximum sentence allowed by law nor was he detained because of indigence. The Eighth Circuit's far reaching interpretation of *Williams v. Illinois, supra,* and *Tate v. Short, supra,* is likely to generate further confusion among the circuits. The holdings of *Williams* and *Tate* do not stand for the sweeping proposition that whenever a person spends more time incarcerated than a wealthier person would have spent, the equal protection clause is violated. Plenary consideration of the matter by this Court is essential.

II.

THE CHANGE IN CIRCUMSTANCE SINCE THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT MAY HAVE RENDERED THIS APPEAL MOOT, HOWEVER IF THE IMMEDIATE ISSUE IS MOOT, THE PUBLIC INTEREST EXCEPTION ALLOWS THIS COURT TO RENDER A DECISION ON THE MERITS.

The appellant, Weldon Ross, was discharged from the authority of the Nebraska Department of Correctional Services on December 13, 1990. His discharge was based upon his time served. The Eighth Circuit's judgment on December 7, 1990, played no part on Ross' discharge.

> Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies. *Deakins v. Monaghan,* 484 U.S. 193, 199, 108 S.Ct. 523, 528, 98 L.Ed.2d 529 (1988); *Preiser v. Newkirk,* 422 U.S. 395, 401, 95 S.Ct. 2330, 2334, 45 L.Ed.2d 272 (1975). To invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and

> likely to be redressed by a favorable judicial decision, *Allen v. Wright*, 468 U.S. 737, 750-51, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556; *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 471-473, 102 S.Ct. 752, 757-59, 70 L.Ed.2d 700 (1982). Article III denies federal courts the power "to decide questions that cannot affect the rights of litigants in the case before them," *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971), and confines them to resolving " 'real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' " *Ibid.* (quoting *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 241, 57 S.Ct. 461, 464, 81 L.Ed. 617 (1937)). This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. To sustain our jurisdiction in the present case, it is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals,. *Deakins, supra*, 484 U.S., at 199, 108 S.Ct., at 528; *Steffel v. Thompson*, 415 U.S. 452, 459, n. 10, 94 S.Ct. 1209, 1216, n. 10, 39 L.Ed.2d 505 (1974). The parties must continue to have a " 'personal stake in the outcome' " of the lawsuit, *Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983) (quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962)).

Lewis v. Continental Bank Corporation, 494 U.S. ___, ___, 110 S.Ct. 1249, 1253-54, 108 L.Ed.2d 400, 411 (1990).

Clarke is aware that in *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968) this Court dealt with

the issue of whether or not the petitioner's appeal was moot because he had completely served his sentence.

> The Court stated that mere release of the prisoner does not automatically foreclose consideration of the merits of the case by the Court, provided the case falls under one or both of the exceptions to the "doctrine of mootness" recognized by the Court in *St. Pierre, supra*. First, the Court held that the State may not effectively deny the prisoner access to the appellate courts until he has been released and then argue that his case has become moot. . . .
>
> The second exception recognized in *St. Pierre* permits adjudication of the merits of a criminal case where the petitioner may suffer future state or federal penalties or disabilities as a result of the judgment. This exception has been expanded to include a wide array of "penalities or disabilities." See, *Fiswick v. United States*, 329 U.S. 211, 67 S.Ct. 224, 91 L.Ed. 196 (1946) (case was not moot because the petitioner might later be subject to deportation for committing a crime of moral turpitude); *United States v. Morgan*, 346 U.S. 502, 74 S.Ct. 247, 98 L.Ed. 248 (1954) (petitioner's case was not moot because subsequent convictions might carry heavier penalties and civil rights might be affected); *Pollard v. United States*, 352 U.S. 354, 77 S.Ct. 481, 1 L.Ed.2d 393 (1957) (the mere possibility of consequences collateral to the imposition of sentence is enough to justify hearing the merits of the case); *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968) (the possibility that the appellant's license to engage in the luncheonette business might be revoked because of a criminal conviction was enough to bring the case within this second exception).
>
> The Court in *Sibron, supra*, held that a criminal case is moot only if it is shown that there is

> no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction. Since Sibron's credibility as a witness would be subject to impeachment by use of the conviction and the conviction might be considered by a court in sentencing in the future, the Court concluded that Sibron would suffer future penalties and disabilities and his case was not moot under *St. Pierre*.

State v. Patterson, 237 Neb. 198, 202-03, ___ N.W.2d ___, ___ (1991).

It cannot be clearly demonstrated that there is no possibility that any legal consequences would be imposed on the basis of the challenged conviction.

This Court has stated that it may adjudicate an apparently moot case if it is one "capable of repetition" as to the wronged party "yet evading review" because of the time required to move the case through the courts. *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911). The present case presents a wrong capable of repetition yet evading review requiring an authoritative adjudication for future guidance. Clarke contends that a prisoner may not be given credit for presentence incarceration unless three conditions are present: (1) the prisoner was held for a bailable offense; (2) the prisoner was unable to make bail because of indigence; and (3) upon conviction the prisoner was sentenced to the statutory maximum sentence for that offense. Furthermore, *Neb.Rev.Stat.* § 28-932 specifically prohibits credit for time served, if the inmate is being held on other charges in addition to the charge for which the sentence is being imposed. An

enhancement hearing was held after Ross was adjudicated guilty of assault by a confined person and was found to be an habitual criminal (p. 10a, infra). It is axiomatic that being charged with assault by a confined person, that one must be detained in custody pursuant to other charges. It also follows, that situations as the one at bar will occur again and again, as long as the statutory provision prohibiting such credit exists. As demonstrated by the present case, a case of this nature is capable of repetition as to the wronged party yet evading review because of the time required to move the case through the courts. In the case at bar, Ross was discharged from the authority of the Nebraska Department of Correctional Services on December 13, 1990, because he had served his time required by state law.

If the issue will in the future continue to evade review, this Court has the power and duty to render a decision on the merits. The issue of whether or not there is a constitutional right to credit for presentence incarceration, when the prisoner is held for a bailable offense, the prisoner is unable to make bail because of indigence, and upon conviction the prisoner is sentenced to less than the statutory maximum and/or said sentence in addition to the presentence incarceration time does not exceed the statutory maximum sentence for said offense, is an issue presented in the case at bar and may continue to evade review in the future. Therefore, Clarke respectfully requests that this Court grant a writ of certiorari to consider the matter on the merits.

More importantly, the present case involves a matter of great public interest because of the need for uniformity of granting a prisoner credit for presentence confinement.

There still remains the possibility that other prisoners may file petitions for federal habeas corpus relief who were charged, convicted, and sentenced under *Neb.Rev.Stat.* § 28-932 (Cum. Supp. 1984) seeking credit for presentence incarceration. A resolution is sought to clarify and have a uniform approach to presentence detention credit when a prisoner is held for a bailable offense, the prisoner is unable to make bail because of indigence, and upon conviction the prisoner is sentenced to less than the statutory maximum sentence and/or the sentence imposed in addition to the presentence detention does not exceed the statutory maximum for said offense.

Federal courts have never been empowered to issue advisory opinions. *FCC v. Pacifica Foundation*, 438 U.S. 726, 735, 98 S.Ct. 3026, 3033, 57 L.Ed.2d 1073 (1978). Clarke is not suggesting that this Court render an advisory opinion, however, it is his position that Ross' claim is still alive, however, in the alternative if this Court determines that this matter is moot that it is a case capable of repetition as to the wronged party yet evading review because of the time required to move the case through the courts and/or it is a case of great public interest which requires this Court to issue a writ of certiorari.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

Harold W. Clarke, Petitioner,

J. KIRK BROWN, #10456
Assistant Attorney General
Chief, Criminal Appellate Section
Nebraska Department of Justice
2115 State Capitol
Lincoln, NE 68509
Tel: (402) 471-2682
Counsel of Record

TERRI M. WEEKS, #18349
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509
Tel: (402) 471-2682
Counsel for Petitioner

March 7, 1991

No. _____

In The

Supreme Court of the United States

October Term, 1990

HAROLD W. CLARKE, THE WARDEN OF THE NEBRASKA STATE PENITENTIARY,

Petitioner,

v.

WELDON ROSS,

Respondent.

APPENDIX

INDEX

Page

1. Judgment of the United States Court of Appeals for the Eighth Circuit, dated December 7, 1990...1a

2. Order of the United States Court of Appeals for the Eighth Circuit denying the Appellee's petition for rehearing *en banc*, dated February 26, 1991.....2a

3. Order of the United States District Court for the District of Nebraska denying the petition for writ of habeas corpus, dated April 10, 1990.....3a

4. Report and Recommendation of the United States Magistrate recommending that the petition for writ of habeas corpus be denied, dated February 26, 1990..... 4a

5. Notice of Appeal of intent to prosecute an appeal to the Eighth Circuit, dated April 17, 1990..... 8a

6. Order of the United States District Court for the District of Nebraska ordering that a certificate of probable cause shall issue, dated April 26, 1990..9a

7. Excerpt portions of testimony from the bill of exceptions at Weldon Ross' sentencing hearing in State court..... 10a

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1694NE

Weldon Ross,	*	
	*	
Appellant,	*	Appeal from the United
vs.	*	States District Court for
	*	the District of Nebraska
Harold Clarke,	*	
	*	
Appellee.	*	

JUDGMENT

This matter was submitted on the briefs without oral argument. It is hereby ordered and adjudged that this matter be remanded to the United States District Court for the District of Nebraska with directions to grant appellant credit for time spent in jail before sentence for failure to make bail due to indigency. See *King v. Wyrick*, 516 F.2d 321, 324 (8th Cir. 1975).

The Court's mandate shall issue forthwith.

December 7, 1990

Order Entered at the Direction of the Court.

Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1694NE

Weldon Ross,	*	
	*	
Appellant,	*	Appeal from the United
vs.	*	States District Court for
	*	the District of Nebraska
Harold Clarke,	*	
	*	
Appellee.	*	

Appellee's petition for rehearing en banc has been considered by the Court and is denied as being untimely filed.

February 26, 1991

Order entered at the direction of the Court.

Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

WELDON ROSS,	*	CV90-L-26
Petitioner,	*	
vs.	*	ORDER OF DENIAL OF WRIT OF HABEAS CORPUS
HAROLD CLARKE,	*	
Respondent.	*	

For the reasons stated in the magistrate's report and recommendation dated February 6, 1990.

IT IS ORDERED that the petition for writ of habeas corpus is denied.

Dated April 10, 1990.

BY THE COURT

Warren K. Urbom
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

WELDON ROSS,	*	CV90-L-26
Petitioner,	*	
	*	REPORT AND
vs.	*	RECOMMENDATION
	*	
HAROLD CLARKE,	*	
Respondent.	*	

Petitioner, an inmate at the Nebraska State Penitentiary, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. Liberally construing the allegations of the petition, *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), I conclude it fails to provide a basis for habeas relief. Because amendment of the petition would be futile, I shall recommend that the petition be denied.

On November 2, 1984, the District Court of Lancaster County, Nebraska convicted petitioner of one count of assault on a confined person. After finding that petitioner was an habitual criminal, the court sentenced him under *Neb. Rev. Stat.* §29-2221 (Reissue 1979), to a term to 10 years imprisonment. Petitioner appealed the conviction and sentence to the Nebraska Supreme Court, which affirmed. *State v. Ross*, 220 Neb. 843, 374 N.W.2d 228 (1985). Thereafter, petitioner sought post-conviction relief in the district court, but such relief was denied.

While the petition indicates that petitioner advances three grounds for relief, he has, in reality one claim. He contends that he should have been given credit for time served prior to his sentencing. Petitioner allegedly spent

one year as a pretrial detainee, and this time was not served on any other sentence of imprisonment.

Given that petitioner presented this claim to the Nebraska Supreme Court on direct appeal, and the claim was resolved against him, I conclude he has exhausted his available state court remedies. *See Rose v. Lundy*, 455 U.S. 509, 518-19 (1982).[1] I therefore turn to the merits of his petition.

The "Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants, irrespective of their economic status." *Williams v. Illinois*, 399 U.S. 235, 244 (1970).[2] Thus, where an indigent defendant is unable to post bond, and where his sentence, together with the time spent in presentence detention, amounts to more than the maximum statutory penalty for the offense of which he was convicted, equal protection requires that he receive credit for the time served prior to sentencing. *King v. Wyrick*, 516 F.2d 321, 323 (8th Cir. 1975).

---

[1] Petitioner also presented the claim in his post-conviction motion, but alleges that the district court refused to give it independent consideration, rejecting it on the basis of the Nebraska Supreme Court's decision. Under Nebraska law, this was a correct result, since post-conviction actions cannot be used to litigate matters already decided on direct appeal. *See State v. Meis*, 223 Neb. 935, 937, 395 N.W.2d 509, 512 (1986).

[2] While petitioner does not directly allege that he was detained prior to trial due to an inability to post bail, I shall assume that to be the case, since such an assumption is the most favorable construction of the petition possible.

Here, the sentence imposed on petitioner was less than the maximum under the habitual criminal statute. Indeed, it was the minimum sentence which could be imposed under that statute. Where a sentence imposed is less than the statutory maximum, a federal court must conclusively presume that presentence detention time was taken into account in imposing the sentence, in the absence of direct evidence to the contrary. *King*, 516 F.2d at 324; *Davis v. Parratt*, 460 F.Supp. 1227, 1233 (D. Neb. 1978). There are statements in the opinion of the Nebraska Supreme Court which indicate that credit for presentence detention was expressly denied by the district court. *Ross*, 220 Neb. at 847, 374 N.W.2d at 331. However, this does not necessarily mean that the district court did not *consider* that time in determining the length of petitioner's sentence. Stated another way, if this court were to grant this petition, vacate petitioner's sentence, and order the Nebraska courts to either resentence petitioner or release him, it would be permissible for the trial court to expressly grant petitioner one year for the time he served prior to sentencing and sentence him to 11 years imprisonment, resulting in the same net sentence. Equal protection prohibits only the imposition of a sentence which exceeds the statutory maximum when presentence detention is taken into account. Petitioner's sentence does not do this. The petition should be denied.

IT THEREFORE IS HEREBY RECOMMENDED, pursuant to 28 U.S.C. §636(b)(1)(b), that the petition for a writ of habeas corpus be denied.

Petitioner is hereby notified that unless objection is made within eleven days after he is served with a copy of this recommendation, he may be held to have waived any

right he may have to appeal the court's order adopting this recommendation.

Dated February 6, 1990.

BY THE COURT

David L. Piester
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

WELDON ROSS,	*	CV90-L-26
Petitioner,	*	NOTICE OF APPEAL
vs.	*	
HAROLD CLARKE,	*	
Respondent.	*	

COMES NOW Weldon Ross, Petitioner in the above entitled case and notify this court of his intent to prosecute an appeal to the Eighth Circuit Court of Appeals, from an order entered by this Court on April 10, 1990.

Petitioner believes this case has merits and is not moot or frivolous.

Respectfully submitted,

Weldon Ross
Petitioner

Dated this 17th day of April, 1990.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

WELDON ROSS,	*	CV90-L-26
Petitioner,	*	ORDER
vs.	*	
HAROLD CLARKE,	*	
Respondent.	*	

Petitioner has filed a notice of appeal, filing 8.

IT IS ORDERED that the petitioner is granted leave to appeal in forma pauperis and a certificate of probable cause shall issue.

Dated April 26, 1990.

BY THE COURT

Warren K. Urbom
United States District Judge

IN THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff, v. WELDON ROSS, Defendant.	)	Docket No. 66 Page No. 278 SENTENCING PROCEEDINGS and MOTION FOR NEW TRIAL

Proceedings had before the HONORABLE ROBERT R. CAMP, JUDGE, at Lincoln, Nebraska, on November 2, 1984.

APPEARANCES

For the Plaintiff	For the Defendant
David W. Stempson Deputy County Attorney County-City Building Lincoln, Nebraska	Michael D. Gooch Deputy Public Defender County-City Building Lincoln, Nebraska

Letitia E. Whittemore
Official Court Reporter
Lincoln, Nebraska

* * *

[p. 10] THE COURT: The Court will find that Weldon Ross is an habitual criminal and the Court does so find.

* * *

[p. 15] THE COURT: * * *

The court is going to impose the minimum sentence provided by law; ten years confinement in an institution under the control of the Nebraska Department of Public Institutions, of Correctional Services, plus the costs of this action.

The Court is midful [sic] of the statute of no credit for offenses of this nature and the Court will not give any credit.

Fine, thank you.

The Court would remand you to the custody of the Department of Correctional Services.

MR. GOOCH: Your Honor, with respect to that, I think the statute only says that you cannot give credit prior to the event, not subsequently. But I'd ask the Court maybe just to look at the statute because, certainly, from March 28th on, Weldon has been in custody on this charge and has not been able to make the bond on this charge. And the statute is real clear that the time before that the Court is not supposed to give credit, but I don't think the statute even suggests that the Court ought to give credit after that. And perhaps if we could just take a moment and look at the statute.

THE COURT: I have. I have read it many, many times since this question was brought up some time ago. He's still being held on those other charges and I guess this alleged offense happened while he was being held on those other charges. So then I don't think even the recent case law that has come down from our Supreme Court where they have given credit after a plea or after a conviction and they gave credit then – I think it was a

Grand Island, a Hall County case – I don't even think that's appropriate in this case because, again, he was still being held under those cases, those other cases, and they were still pending in court. So I don't think any credit is available.

Fine, thank you.

* * *

[p. 18] MR. STEMPSON: The State would move to dismiss counts – at 66, page 3.

THE COURT: What? Sixty-six, page 3?

MR. STEMPSON: Sixty-six, page 55, and 66, page 238 at the State's cost.

THE COURT: Two-thirty-eight?

MR. STEMPSON: Yes.

MR. GOOCH: We have no objection to any of those cases being dismissed.

THE COURT: Those matters will stand dismissed on the State's motion at State's cost.